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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 548

HERBERT L. ELY, Individually and as Chairman of the Democratic Party of Arizona, Appellant,

v.

GARY PETER KLAHR, JACK WILLIAMS, Governor of the State of Arizona and WESLEY BOLIN, Secretary of State of Arizona, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the three judge District Court for the District of Arizona on the grounds that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and, furthermore, the District Court expressly

limited the effect of its Judgment and Decree to the 1970 elections prior to the completion of the 1970 dicennial census.

QUESTION PRESENTED

Can a Legislature use census figures brought up to date by a fair and defensible formula implemented by computer work as the basis for reapportionment and redistricting on the eve of a dicennial census?

STATEMENT OF THE CASE

In the Judgment and Decree of the three judge District Court of February 2, 1966, and the First Supplemental Decree filed March 14, 1966, the Court implemented its own division of the precincts and counties of Arizona under what was then considered acceptable degrees of deviation, plus or

minus 15%. The Legislature of Arizona was elected in 1966 and 1968 under that Decree.

The Legislature, at a special session in 1967, enacted Chapter 1, 28th Legislature, First Special Session, apportioning both the Senate and the House of Representatives of Arizona. That measure was referred to the people of Arizona in the general election of 1968, and met with their approval. The three judge District Court in an opinion filed July 22, 1969, struck down this proposal, basing its decision on the subsequently decided cases of Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and Wells v. Rockefeller, 394 U.S. 542 (1969).

The Legislature was called into special session in January of 1970, and enacted Chapter 1 of the First Special Session of the 29th Legislature of the State of Arizona,

1970, the subject matter of this appeal.

The three judge District Court was again convened to rule on the constitutional validity of the new apportionment plan. Appellant, Intervenor-Plaintiff below, submitted to the Court, and asked the Court to place into effect, an apportionment plan devised by his counsel.

The District Court thus had four alternatives. It could decide: (1) that the 1966 court ordered plan should remain in effect; (2) that the new legislative apportionment should be used; (3) to place Appellant's plan into effect; or (4) to rule that at-large elections must be held.

On careful reflection, the District Court opted for instituting the new legislative plan solely for purposes of the 1970 general election. In its decree the District Court

directs the Legislature to draw a new apportionment plan when the 1970 census figures are available, to be completed no later than November 1, 1971.

ARGUMENT

We respectfully submit that the Third Supplemental Decree of the District Court (see pages 18a, et seq., of the Appellant's Jurisdictional Statement) was the best practical alternative which was available to the District Court under the time pressure of the upcoming primary election.

That decree, a reasonable order designed to prevent the chaos of an at-large election, grants redress to any party if the Legislature fails to properly apportion itself by November 1, 1971, using the population statistics from the 1970 census which will become

available in the summer of 1971. The effect of the decree is thus not a final judgment in the sense that the parties would be precluded from further relief at the District Court level.

We further point out that the apportionment plan adopted by the District Court was viewed by that Court as the least unconstitutional and most workable of the three alternative plans. The decree limits the use of this apportionment to the 1970 election. The alleged unconstitutionality is, therefore, not a problem which is ". . . capable of repetition, yet evading review." Southern Pacific Terminal Company v. I.C.C., 219 U.S. 498 (1911).

No useful purpose could be served by this Court ruling on this matter at this point. This Court has repeatedly expressed its

unwillingness to draw reapportionment plans, wisely leaving that mechanical function to the respective state legislatures. See, e.g., Kirkpatrick and Wells, supra.

We most strongly urge that this Court need make no ruling where, as here, the state legislature is already under the judicial compulsion of the District Court decree to reapportion itself. Armed with the new statistics from the 1970 census, the Legislature will be able to draw legislative districts with the precision outlined by this Court in the Kirkpatrick and Wells cases.

We turn now to the cases cited by Appellant in his Jurisdictional Statement in the belief that they sustain the jurisdiction of this Court. Each of them is entirely distinguishable from the case at bar.

In Moore v. Ogilvie, 394 U.S. 814 (1969), independent candidates for the offices of electors of President and Vice President of the United States sought declaratory and injunctive relief, after the election, from state statutes by which their names were not allowed on ballots. While holding that the question was not moot, the Court relied exclusively on the fact that the "burden. . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections. The problem is therefore 'capable of repetition, yet evading review.' . . ." 394 U.S. 816.

Such is not the case at bar, where the District Court approved the reapportionment plan solely for purposes of the 1970 election. The order specifically promises redress to any party if the Legislature fails

to properly apportion itself when the new census figures become available (see Jurisdictional Statement, page 20a, Paragraph VII of the Third Supplemental Decree).

Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73 (1960), merely upheld the language of 28 U.S.C., § 1253, which provides that an order granting or denying an injunction in any civil action "required by any Act of Congress to be heard and determined by a district court of three judges" may be appealed directly to the United States Supreme Court. There was no issue of mootness or finality; the District Court had dismissed the suit for injunction, a final decision. In that case the constitutional harm claimed would continue against the plaintiff. Such continuing harm is not present in the case at bar.

Query v. United States, 316 U.S. 486 (1942), held that final orders of a three judge District Court are directly appealable to the Supreme Court. That point is not in issue in the case at bar. The District Court has retained jurisdiction of the matter until at least November 1, 1971, (Paragraph VII of the Third Supplemental Decree) and the decree is thus not final at this point.

Palmetto Fire Insurance Co. v. Conn., 272 U.S. 295 (1926), decided before the streamlined appeal procedure was instituted in federal courts, held that where the District Court grants or withholds an injunction on the ground of the unconstitutionality of a state law, appeal to the Supreme Court is allowed. Again, that is not in issue here. The state apportionment law is of no force

and effect now that the election is over. Any damage which may have been done, and we point out that no damaging effect is demonstrable, is incapable of repetition.

Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928), held that a District Court order dismissing an action which challenged the constitutionality of a state statute was reviewable by the Supreme Court. In the case at bar, there is no dismissal of the action, the District Court decree not being of a final nature.

Kesler v. Department of Public Safety of Utah, 369 U.S. 153 (1962), offers little comfort to Appellant. That case holds that a direct appeal to the United States Supreme Court from the judgment of a three judge District Court lies only when the case was a proper one for convening a three judge court.

". . . [T]his Court has been led by a long series of decisions, in a variety of situations, to generalize that this procedural device was not to be viewed 'as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.' [Citation omitted]." 369 U.S. 156.

There the action of the District Court was final in that the statute in question was upheld and relief denied. The injury caused by the alleged unconstitutionality of the statute was continuing and capable of repetition, unlike the situation in the case at bar.

The whole thrust of the legislative endeavor was an attempt to follow the mandate of Kirkpatrick and Wells without any regard to county lines or any other artificial deterrent to achieving absolute equality of numbers in each district. A formula was

adopted which converted 1968 precinct voter registration to 1960 precinct population. The formula is as follows:

$$\text{1968 Precinct Voter Registration} \times \frac{\text{1960 County Population}}{\text{1968 County Registration}} = \text{1960 Precinct Population.}$$

This formula is best understood by realizing that a certain percentage of the people registered to vote in a county reside within any given precinct, and by multiplying this percentage by the county census population, one can arrive at a precinct population figure. The Legislature felt that this formulaed precision was necessary in order to be within the bounds of the instructions of the Kirkpatrick case.

". . . The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' Wesberry v Sanders, supra, at 18, 11 L Ed 2d at 492, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise methematical [sic] equality." 394 U.S. 531, 532.

By the very definition, or lack of the same, in the census tract descriptions, it is impossible in a rapidly growing state to use these as a basis when the figures are nine to ten years old.

The three judge District Court in 1966, in drawing the plan under which two Legislatures were elected (1966 and 1968), used 1960 census data when dealing with whole counties and the most recent voter registration data as the basis of subdivisions within

counties. The Legislature felt it was safe to use this with the aid of the most modern method of accurate computation, to-wit, a computer, in order to effectuate the mandate of this Court, as set forth in Kirkpatrick and Wells.

Attached hereto as an appendix is a copy of the letter written by the chief architect of the mechanics of this plan, addressed to the Speaker of the House and the President of the Senate, explaining the method used in arriving at this measure.

In order to achieve compactness, or as nearly as possible, there are, of course, concentrations of the same ethnic group in certain districts. This is by virtue of the geography of Arizona rather than through any design, intent or invidious plan to discriminate. Confessedly, this is only a temporar

plan, enacted on the eve of a new census, in one of the three most rapidly growing states in the Union.

The burden now rests on the Legislature of Arizona to use current figures under the mandate of Kirkpatrick and Wells for the election of 1972.

If, as is alleged, this was a purposeful discriminatory enactment, there should have been a great change in the make-up of both houses. As it so happens, the House remains the same percentage of Republicans and Democrats as under the previous court enacted plan, and there is a net gain of one Republican in the Senate. This was from District 3, where registration was overwhelmingly Democratic.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the questions on which this cause depend are moot, that the District Court decree was not a final disposition of the matter, and that the three judge District Court has provided for the reflective demise of this matter merely as a temporary measure prior to receipt of the 1970 census figures.

Appellees respectfully move this Court to dismiss this appeal or in the alternative to reaffirm the judgment entered in the cause by the three judge District Court in Arizona.

October 1970.

Respectfully submitted,

GARY K. NELSON
The Attorney General of
the State of Arizona

JOHN M. McGOWAN
Special Assistant
Attorney General

OFFICE OF THE MARICOPA COUNTY RECORDER

February 9, 1970

The Honorable William S. Porter
President of the Senate
Senate Wing, Capitol Building
Phoenix, Arizona 85007

The Honorable John H. Haugh
Speaker of the House
House Wing, Capitol Building
Phoenix, Arizona 85007

Gentlemen:

I am writing to explain in further detail the techniques which were employed in the reapportionment program and the rationale behind them. Let me begin with the rationale.

As you know, the reapportionment committee was at a loss as to whether they should employ 1960 census data or 1968 voter registration, or some combination of both in an updated reapportionment plan.

In writing the computer program, which subsequently produced the plan adopted by the Legislature, I had to make some decisions about which data should be included in the computer program. I rejected using pure 1960 census data for three reasons. First, it has been well-established that, due to the phenomenal growth of Arizona, these figures are sadly out of date. Secondly, it has been further established that the use of pure 1960 census data would effectively disenfranchise the newcomer to Arizona.

PAUL N. MARSTON, RECORDER PAUL A. THOMAS, CHIEF DEPUTY

103 COUNTY ADMINISTRATION BUILDING 111 SOUTH THIRD AVENUE PHOENIX, ARIZONA

Thirdly, there is the fact that there is almost no relationship between census tract and enumeration district boundaries and our political precinct boundaries, making it impossible to arrive at an accurate figure for a 1960 census count within an existing precinct.

I considered using census tracts instead of precincts and letting the various counties fit their precinct structure to the census tracts. This proposal was rejected because, quite often, the census tracts were unsuitable for use as a political precinct, even when subdivided; and, secondly, because we discovered that there were no legal descriptions for the census tracts, making it impossible to draft a bill employing same.

Also considered was the possibility of using pure 1968 voter registration data, as this count is available on a precinct by precinct basis, and this figure does tend to show where the people live now, as opposed to where they lived ten years ago. This approach was rejected, since it has been contended, with some justification, that the use of voter registration data disenfranchises minority groups, particularly Indians, who are much less likely to register to vote.

We were faced then with the problem of neither of the readily available statistics being able to satisfactorily do the reapportionment job.

Our solution was to adopt the approach that the Federal District Court took in its temporary plan, when they used 1960 census data when dealing with whole counties and the most recent voter registration data to subdivide inside counties. The advantage of this approach, I felt, was that the census data gave weight to a county for all of the people within it, whether registered to vote or not, and yet gave weight to the people who have moved to Arizona in recent years. In this fashion we can give weight to the minority groups and to the newcomer without disenfranchising either.

Our first problem was to devise some method of converting voter registration to census figures, or vice versa, since the two cannot be added together any more than apples and oranges can be added together. A formula was adopted which converted 1968 precinct voter registration to 1960 precinct population. The formula is as follows:

$$\text{1968 Precinct Voter Registration} \times \frac{\text{1960 County Population}}{\text{1968 County Registration}} = \text{1960 Precinct Population}$$

This formula is best understood by realizing that a certain percentage of the people registered to vote in a county reside within any given precinct, and by multiplying this percentage by the county census population, one can arrive at a precinct population figure.

The basic reason for the adoption of this formula in the reapportionment plan is that there did not seem to be any other way to proceed from a mechanical point of view. We could not get a census count by precinct, and we could not make the precincts fit the census boundaries. The plan devised uses 1960 census data for the counties and voter registration data within a county. The formula serves only as a means to cross county boundaries, and not mix apples and oranges. It should be emphasized that, with the use of this formula, in dealing with a county as a whole, you are using census data; and in dealing with a portion of a county, you are using voter registration data.

The computer program was designed to be able to cross county boundaries, since it was our interpretation of the most recent court decisions, that population deviations must be as close to zero as possible. To accomplish this goal, everything must be sacrificed, and that certainly includes county integrity. The results, I think, speak for themselves.

By using a computer, we were able to keep the deviations under 1%, and I personally feel that it is not possible, within any reasonable amount of time, to get them any lower than they are in the plan adopted by the Legislature. For these reasons, I believe that if the Court will accept the use of the mix of 1960 census and 1968 voter registration data, that they will uphold the Legislature's plan.

If you have any questions, or if I can be of any further service to you in this matter, just let me know.

Sincerely yours,

Paul

PAUL N. MARSTON
Maricopa County Recorder

PNM:ell

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

JOHN M. McGOWAN, being duly sworn, deposes and says that he is the attorney for Defendant Appellees Jack Williams, Governor of Arizona, and Wesley Bolin, Secretary of State of Arizona; that at 5 p.m. on November 23, 1970, he served copies of this Motion to Dismiss or Affirm in accordance with the requirements of Rule 33, paragraph 1, of Supreme Court Rules, by depositing them in a mail box with first class postage prepaid, addressed to the following counsel of record:

PHILIP J. SHEA
Suite 310, 114 West Adams Street
Phoenix, Arizona 85003

SIMON AND JEKEL
Attention: J. Stephen Simon
600 North Old Scottsdale Road
Scottsdale, Arizona

JOHN M. McGOWAN
Special Assistant Attorney General

SUBSCRIBED AND SWORN to before me this

_____ day of November, 1970.

_____

NOTARY PUBLIC

My Commission expires:

_____